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**In the
Supreme Court of the United States**

OCTOBER TERM, 1983

ANDRA A. CAPACI,

PETITIONER,

versus

KATZ & BESTHOFF, INC.

RESPONDENT.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

INTERVENOR

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**Carl J. Schumacher, Jr.
C. David Schumacher
SCHUMACHER
LAW CORPORATION, LTD.
1106 Arabella Street
P.O. Box 15348
New Orleans, LA 70175
(504) 899-8904**

Attorneys for Andra A. Capaci

QUESTIONS PRESENTED FOR REVIEW

I

Whether in a Title VII sex discrimination case, after the burden shifted and respondent rebutted the presumption of discrimination in its case in chief by setting forth reasons for petitioner's rejection and termination, it was reversible error not to allow petitioner opportunity in her case on rebuttal to demonstrate that the proffered reasons were untrue and pretextual by introducing into evidence the personnel files of 123 males who had committed with impunity acts similar to those ascribed to petitioner on the ground that such evidence should have been anticipatorily introduced during her case in chief.

II

Whether upon finding petitioner's counsel in contempt and suspending him from practice before the court during respondent's case in chief, the court committed prejudicial error and denial of due process to petitioner by continuing the taking of evidence offered by respondent adverse to petitioner, who was unrepresented by counsel and neither willing nor qualified to represent herself.

III

Whether upon a finding in petitioner's favor and against respondent declaring that respondent discriminated against petitioner by violating the retaliation prohibition of 42 U.S.C. 2000e-3 by building of petitioner's personnel file, which was affirmed by the Court of Appeals, it was error to cast petitioner for costs, and not to remand for a determination of her damages, costs and attorneys' fees.

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EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Intervenor.

PETITION FOR A WRIT OF CERTIORARI
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MAY IT PLEASE THE COURT:

Andra Capaci, plaintiff in the United States District Court for the Eastern District of Louisiana and co-appellant in the Fifth Circuit Court of Appeals, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered on August 8, 1983, the court having denied petitions for rehearing on October 3, 1983.

OPINIONS BELOW

The opinion of the district court as reported under the caption Andra A. Capaci, plaintiff and Equal Opportunity Commission, plaintiff/intervenor vs. Katz & Besthoff, defendant was rendered on October 15, 1981 and is reported at 525 F.Supp. 317 (Appendix, p. 15, Document B). The district court entered final judgment pursuant to its opinion of October 15, 1981 on March 24, 1982. That judgment is dated March 19, 1982 and appears at Appendix, p. 87, Document C.

The opinion of the United States Court of Appeals for the Fifth Circuit is reported under the caption Andra A. Capaci, plaintiff/appellant, cross-appellee, vs. Katz & Besthoff, Inc., defendant/appellee, cross-appellant, Equal Employment Opportunity Commission, intervenor/appellant, at 711 F.2d 647 and is dated August 8, 1983 (Appendix, p. 90, Document D). The opinion of the court of appeals reverses the district court's finding of nondiscrimination in the selection of manager/trainees for the period July, 1965 through December, 1972, a part of the class on behalf of which plaintiff, Capaci, brought this suit, and remanded for determination of appropriate remedies. In all other respects, and particularly the district court's denial of the individual claim of Andra Capaci asserting that Katz & Besthoff, Inc. (hereinafter K & B) had discriminated against her by denying her promotion into management, subjecting her to sexual harrassment, and harrassing and discharging her in retaliation for filing discrimination charges, the court affirmed, including that portion of the district court's judgment in which the district judge agreed with Capaci that K & B had deliberately violated the retaliation prohibition of 42 U.S.C. 2000e-3 by its building of the plaintiff's personnel file, limiting plaintiff's relief to

the destruction of her file at the conclusion of the litigation without making provision for damages, attorney's fees, and costs under 42 U.S.C. 200e-5(K) in favor of Capaci as a prevailing party.

Petitions for rehearing and suggestion for rehearing en banc were denied on October 3, 1983 (Appendix, p. 127, Document E).

JURISDICTION

The judgment of the district court was rendered on the 19th day of March, 1982 and entered March 24, 1982.

The judgment of the Court of Appeals for the Fifth Circuit was rendered August 8, 1983 and the Corrected Judgment of the U.S. Court of Appeals for the Fifth Circuit on Petition For Re-hearing And Suggestion For Rehearing En Banc was rendered on October 3, 1983.

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or Naval Forces, or in the Militia, when the actual service in time of War or public danger; nor shall any person be subject for

the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The statutory provisions involved are 42 U.S.C. 2000e *et seq.*, particularly U.S.C. 2000e-3(A) at Appendix, p. 130, Document G, 42 U.S.C. 2000e-5(G) and (K) at Appendix, p. 131, Document H.

STATEMENT OF THE CASE

Andra Capaci, applicant, was first employed by Katz & Besthoff, Inc., respondent, as a student pharmacist in 1959 while a student at Loyola University's School of Pharmacy. Upon graduation in 1963, K & B certified as to her satisfactory work and good moral character in connection with her application to become a registered pharmacist in Louisiana, and employed her as a registered pharmacist in 1963. K & B is a retail pharmacy chain that grew from one store opened in New Orleans in 1905 to eighty stores by 1979. The first nine years of petitioner's employment were unexceptional. She received periodic wage increases, but continued to work as an ordinary pharmacist as her male contemporaries were being promoted to positions as chief pharmacists, and managerial positions in stores or as supervisors. At least as late as February 2, 1972, Sidney Besthoff, III, the president of K & B, regarded her as "one of our best" (Exhibit P-I 49—letter to Donald O. Marshall, Appendix, p. 129, Document F). But Capaci believed herself to be qualified by education and experience to serve in a more responsible position; she knew of Title VII's prohibition against employment discrimination on the basis of

sex, and by 1972 decided to seek promotion rather than waiting to be called. She also knew what both the district court and the court of appeal found as fact: that although the work force of K & B was largely female, its managerial force was predominately male. 525 F.Supp. p. 321, n. 2, Appendix, p. 18, Document B, Sidney Besthoff's testimony Feb. 13, 1979, p. 114, 115.

Petitioner through perservance was interviewed by Mr. Besthoff on August 5, 1972 with regard to her desire for promotion. While testifying about the interview, it was Mr. Besthoff's testimony that she was a "Perfectly capable pharmacist" (Transcript Feb. 14, 1979, p. 140); "She had been a very satisfactory pharmacist. There was no problem with her. We never had anything other than good about Ms. Capaci. She was a perfectly capable *woman*." (Transcript Feb. 13, 1979, p. 191). But he characterized her as "over ambitious, aggressive" in his notes of the interview because she aspired to be a supervisor. Mr. Besthoff's notes of the interview are on document B-3 of her personnel file (P exhibit A¹) and at line 27 read, "Would be good CRx [chief pharmacist] - #2?", but nonetheless he advised her to "Have faith" (line 29) and "move to Veterans" (line 30), another store. The decision was made not to promote, and Ms. Capaci filed her first charge with the EEOC on January 11, 1973 (Exhibit PI 19, Appendix, p. 133, Document I). The commission investigated and as to petitioner's

¹ Capaci's personnel file is in evidence as P exhibit A, and those page entries while she was in a student capacity are prefixed by the letter A, those while she was in the capacity of a registered pharmacist, but before Jan. 11, 1973, the date she made her first charge to the EEOC, are prefixed by the letter B, and those post charge, i.e., from January 11, 1973 until she was fired on March 22, 1975, by the letter C.

first charge, that respondent violated Title VII by refusing to promote her and other similarly situated females because of their sex, determined:

Respondent employs (as of July 15, 1973) a total of 153 store level management; including 47 managers, 45 assistant managers, 18 chief pharmacists, 39 Relief managers and 4 store supervisors. Of these, only two are females (1.3%); both chief pharmacists. None of the 99 pharmacists employed are females.

During 1972 and 1973, 26 promotions were made to store management positions. Of these, only 4 were females (15.3%) and each of these promotions was made only after Respondent received notification of Charging Party's charge of sex discrimination in promotion practices of Respondent.

* * * *

Respondent alleges that Charging Party's tardiness, use of the phone for personal calls, generally slow work performance, and inability to get along with female co-workers were the reasons she was denied promotions to management positions. Respondent submitted records which substantiate Charging Party's tardiness; however, failed to produce any evidence in support of the other allegations.

Charging Party does not dispute her frequent tardiness; however our investigation revealed that males with similar punctuality difficulties have been promoted over Charging Party despite their record of tardiness.

* * * *

Having examined the entire record, I conclude

that there is reasonable cause to believe that Title VII of the Civil Rights Act of 1964, as amended, has been violated in the manner alleged. (Exhibit PI 10, Appendix, p. 135, Document J).

Ms. Capaci's charge of January 11, 1973 had a catalytic effect, not at the time contemplated by her, which resulted in a second charge by her against K & B in which she alleged that Respondent had harassed her for having filed the original charge. Again, the EEOC investigated and determined:

The evidence obtained by the Commission supports this charge.

A review of a copy of Charging Party's personnel file submitted by Respondent shows that serving a ten year period prior to Respondents notification of Charging Party's identity as the Charging Party in a previous charge filed with the Commission, Charging Party has received only three "Incident Reports." Following Respondent's notification of Charging Party's identity, twelve incident reports and one customer complaint were placed in Charging Party's file. Two of the incident reports were based on Charging Party's participation in an organization active in eliminating sex discrimination in employment. These reports are in themselves prima facie evidence of harassment for Charging Party's opposition to unlawful sex discrimination. The sudden, unexplained increase in the number of incident reports, the inclusion in Charging Party's personnel file of a customer complaint not reasonably associated with Charging Party and the removal of all favorable letters and notices from Charging Party's file are further evidence of Respondent's intent to harass Charging Party for having filed a

previous Charge of Discrimination.

Accordingly, based on the evidence obtained in this investigation, the Commission concludes that there is reasonable cause to believe that Charging Party has been subjected to reprisal action by Respondent. (Exhibit PI 11, Appendix, p. 138, Document K.)

The Commission's "Determination" of reasonable cause to believe that Ms. Capaci's denial of a wage increase, like Respondent's failure to promote her, was retaliation for having filed previous charges of discrimination is reproduced at Appendix, p. 140, Document L, having been introduced into evidence as exhibit PI 12.

Suit was filed on October 8, 1974. The plaintiff's Motion To Determine Propriety Of Class Action and defendant's Motion To Dismiss were argued and submitted on March 10, 1976, and decided by the district court Opinion of July 31, 1976 reported at 72 F.R.D. 71 (1976), Appendix, p. 1, Document A. On January 4, 1977 the EEOC moved to intervene in the suit, a motion welcomed by the plaintiff and opposed by the defendant. That dispute was resolved when the district judge on July 19, 1977 said that either the plaintiff or intervenor could represent the interest of the class, but not both and the plaintiff believing that the Commission could better represent the class interests, the court on that date decertified the class and affirmed the magistrate's order permitting the EEOC's intervention.

The trial began January 19, 1979. On March 5, 1979 the plaintiff and intervenor rested. The defendant's case began that day and continued until April 2, 1979.

On March 26, 1979 the district judge held plaintiff's

counsel, sole practitioner Carl J. Schumacher, Jr., in contempt of the court, suspended him from practice in the judge's court for an indefinite period of time with permission to apply for readmission after the expiration of 60 days.

At the same time, the trial judge ordered that the personal complaint of Ms. Capaci be severed, to be tried at a later date, and continued hearing the defendant's evidence against the EEOC.

On March 27, 1979 Ms. Capaci moved the court to delay the trial for a reasonable time to permit her to engage replacement counsel, realizing that evidence offered in defense to the EEOC's case could impact her own. On March 30, 1979 the court denied plaintiff's motion and the trial continued. While the plaintiff was unrepresented by counsel on March 26, 1979, K & B called the witness June Wittenberg Buras ostensibly as a witness against the EEOC, but in its Post Trial Brief against Ms. Capaci, at p. 115, K & B says:

June Wittenburg Buras was a cosmetics supervisor. She testified that her job would take her occasionally to Store No. 13 where she met Capaci and observed some of her work habits. Buras stated:

'Well, she (Capaci) spent quite a bit of time talking with the customers, and a lot of times when—well, this is not only at Store No. 13, it was at all the stores. Like whenever I was in the store, she usually spent time talking to me. It was embarrassing in a lot of situations because there were customers waiting and she would be on the phone a long

time....She would discuss it with me how she would like to be a chief pharmacist and how she would like to be a cosmetic supervisor and wanted to know how I got the job. She was very interested in getting the same type job...She talked about the people she was dating, the way things should be. She talked about Weight Watchers and stuff like that.' (30/120-124).

During K & B's case it also called Saul Schneider, its Prescription Director, on March 29, 1979, again ostensibly as a witness in defense of its case against the EEOC. But again K & B used testimony taken while Ms. Capaci was unrepresented against her when it argued in its Post-Trial Brief, at p. 141:

Saul Schneider, K&B's Prescription Director, testified that only authorized people are allowed in the prescription department. (32/139) Signs are usually posted by the entrance ways. And while there was some testimony at the trial about other individuals being permitted into the prescription department, Schneider said he could only foresee rare exceptions for not following the policy.

'I can only recall a mother coming into the store late one night with a baby saying 'Please call my doctor. He is leaving to go on an emergency and I must use the telephone to call the doctor because the baby is taking medicine', and under the circumstances, the pharmacist may allow the person, in fact, did allow the person, to go back into the drug department at least far enough to pick up the telephone and find out what else the doctor wanted her to do, on an immediate type of emergency basis. But outside of something like that it would be extremely rare.' (32½140-141)

The evidence had no bearing on the class claim and was used solely in an effort to bolster an articulated reason for petitioner's termination.

On April 14, 1980 the trial of Capaci's individual claim was resumed. The defendant rested its case, whereupon plaintiff produced rebuttal witnesses and offered rebuttal documentary evidence in the form of 123 personnel files of male K & B pharmacists who were not discharged, but in fact were promoted, in situations similar to plaintiff's. This evidence was offered in order to demonstrate that respondent's stated reasons for not promoting, and harassing, and firing petitioner were pretextual. However, the trial judge refused to admit the personnel files of the 123 males because he was of the opinion that the plaintiff should have undertaken to prove K & B's pretext in plaintiff's case in chief; that is, the plaintiff should have offered anticipatory pretextual evidence before hearing the defendant's case.

The Fifth Circuit in affirming, 711 F.2d at 664, stated, "The court made specific findings on issues of lack of pretext in lack of promotion and discharge. 525 F.Supp. at 345, 350." This statement begs the question; shouldn't plaintiff be afforded a fair opportunity to show that defendant's stated reason for plaintiff's rejection was in fact pretext by showing she was subjected to disparate treatment when her record is compared with similarly situated males?

The ultimate irony of this case is that but for Ms. Capaci's strength and fortitude and willingness to be the "whistle blower", and institute suit and defer to the EEOC on the class representation, the Court of Appeals for the Fifth Circuit would never have been able to reach the

conclusion that respondent discriminated in the selection of manager trainees for the period July, 1965 through December, 1972, and remand for appropriate remedies.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

This suit began when Andra Capaci, then a pharmacist in the employ of respondent, K & B, filed a class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, alleging sex discrimination by her employer. The EEOC intervened, alleging that respondent had failed to hire and promote females into management positions on the same basis as males.

ARGUMENT

I

The trial court's exclusion of the 123 personnel files of male employees which were offered to demonstrate that men whose work performance was similar to Ms. Capaci's were treated more favorably and promoted, when offered in rebuttal to the defense that petitioner was rejected and fired for a legitimate nondiscriminatory reason, and the Fifth Circuit's approval of that ruling as being within the discretion of the trial judge, do not comport with this Court's teachings in *United States Postal Service Board of Governors v. Aikens*, __ U.S. __, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).²

² "She must *now* have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the

Petitioner should not be precluded from attempting to demonstrate that the litany of the K & B male executives as to their reasons for refusing to promote and firing Capaci was pretext, for as this Court observed in *Aikens, supra*, "There will seldom be 'eyewitnesses' testimony as to the employer's mental process." 103 S.Ct. at 1482. Therefore, in an equal opportunity case, *after* the burden has shifted to the employer to rebut the presumption of discrimination, and *if* the employer sets forth its avowed reasons for plaintiff's rejection and firing, as it did in the instant case,³ plaintiff should *then* be allowed the opportunity to demonstrate that the proffered reasons were not the true reasons for the employment decisions but rather were a pretext. See *Burdine, supra*. The files that were not admitted establish comparable performance and incidents by male pharmacists, for which they were not discharged and may were promoted.⁴

(Footnote 2 continued)

court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See *McDonnell Douglas*, 411 U.S., at 804-805, 93 S.Ct., at 1825-1826." *Burdine, supra*, 450 U.S., at 256, 101 S.Ct., at 1095. (Emphasis added.)

³ Respondent asserts that Ms. Capaci's handling of the "Lambremont incident" was against company policy thereby justifying discharge when combined with additional misconduct alleged to have previously disqualified her from promotion: (a) excessive use of the telephone for personal reasons; (b) lateness; and (c) poor organization in performing her duties.

⁴ An offer was made of the files themselves. A review of the files in issue indicates many males had performance of the same or lesser quality than plaintiff. Also many incidents of a more serious nature than that asserted against plaintiff are contained in these files. For example, the file for Earl D'Aunoy, (P-37) contains numerous incidents of errors in dispensing medicine, three complaint letters from customers, and

The essential teaching of the Court in *Burdine*, *supra*, 450 U.S., at 258, 101 S.Ct., at 1096 is that in a Title VII case the plaintiff must be afforded "a full and fair opportunity" to present evidence that the respondent's asserted reasons for its behavior are pretextual. For the trial judge to have refused to allow the evidence to be introduced in rebuttal because he found that the files should have been introduced during petitioner's case in chief, and for the appellate court not to have found that refusal to be an abuse of discretion, was to lose sight of this Court's admonition:

The method suggested in *McDonnell Douglas* for pursuing this inquiry, however, was never intended to be rigid, mechanized, or ritualistic. Rather,

(Footnote 4 continued)

evaluations which indicate poor relations with customers and fellow employees, yet he was retained. Carl Dugas (P-41) was promoted to chief pharmacist despite numerous incidents of distributing wrong medication and evaluations indicating poor employee relations and an inability to deal with pressure. The file of Alfred Gaudet (P-49) contains 41 incident reports of dispensing drugs improperly, a report that he called the police when a customer presented a questionable prescription (contrary to company policy) and a report that he talked on the phone excessively. Eugene Kaufman's file (P-66) indicates poor evaluations, lateness, and mistakes in filling prescriptions. Carroll Culley's file (P-34) indicates several incidents in which he was rude to customers and ten incident reports of dispensing the wrong medication. Mr. Gaudet, Mr. Kaufman and Mr. Culley were not discharged as was the plaintiff, indeed they were each promoted. Albert Parche (P-87), Harold Archer (P-9) and Armand Bellau (P-12) had incidents in which customers became upset and caused a scene after being given the wrong medication. None were discharged. Ronald Rome's file (P-100) contains numerous incidents of dispensing the wrong medication, an incident with a customer, an incident of opening the store late, yet Mr. Rome was promoted. The file of Bruce Bordes (P-17) contains an incident of giving a customer medication while she waited, problems with distributing the wrong medication, incidents of talking on the phone excessively, and an inability to deal with pressure. Not only wasn't Mr. Bordes discharged, he was promoted.

it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.

Furnco Construction Corp. v. Waters, 438 U.S. 567, 577, 98 S.Ct. 2949, 57 L.Ed.2d 957, 967 (1978).

In addition to preventing a miscarriage of justice, there are special and important reasons why review on writ of certiorari should be granted in the instant case; not only has the Fifth Circuit Court of Appeals rendered a decision in conflict with the decisions of all other federal courts of appeals on the same matter,⁵ but also, as noted above, the decision is in conflict with the decisions of this Court.

II

For five days after Capaci's counsel was suspended the trial court heard evidence with the plaintiff unrepresented. Although the court intended to limit such evidence to the suit between the EEOC and K & B, it clearly did not do so with the testimony of Saul Schneider and Jane Buras. The trial judge said:

⁵ See, *Bundy v. Jackson*, 641 F.2d 934, at 951 (D.C. Cir. 1981); *Cartagena v. Secretary of Navy*, 618 F.2d 130, at 135 (1st Cir. 1980); *Schwabenbauer v. Board of Ed., Etc.*, 667 F.2d 305, at 310 (2nd Cir. 1981); *Whack v. Peabody & Wind Engineering Co.*, 595 F.2d 190, at 193 (3rd Cir. 1979); *Ambush v. Montgomery County Government Dept. of Finance Division of Revenue*, 620 F.2d 1048, at 1052 (4th Cir. 1980); *Chrisner v. Complete Auto Trans. Inc.*, 645 F.2d 1251, at 1263 (6th Cir. 1981); *Sherkow v. State of Wis., Dept. of Public Instruction*, 630 F.2d 498, at 502 (7th Cir. 1980); *Hunter v. St. Louis-San Francisco Ry. Co.*, 639 F.2d 424, at 426 (8th Cir. 1981); *Muntin v. State of Cal. Parks and Recreation Dept.*, 671 F.2d 360, at 362 (9th Cir. 1982); *Nulf v. International Paper Co.*, 656 F.2d 553, at 558 (10th Cir. 1981); *Watson v. National Linen Service*, 686 F.2d 877, at 881 (11th Cir. 1982).

So there will be no misunderstanding, the case of Ms. Capaci is suspended as of now, as of this morning. I will disregard any evidence that has any direct effect upon her case unless it also affects the EEOC's case. As far as her case is concerned, through, I will disregard it until she has her lawyer and her trial is resumed and if necessary we will call back the same witnesses that we are calling now which you think you may need to defend yourself in her case. I am doing this, stating that so that she will have a chance to fully cross-examine any witness which might affect her case.

711 F.2d at 665. However, the following year when respondent concluded its case, it did not recall Ms. Buras or Mr. Schneider. Although the district judge did not *eo nomine* refer to the testimony of Mr. Schneider or Ms. Buras in his opinion,⁶ the fact remains that the testimony of these witnesses in substantial measure related to Ms. Capaci and was heard by the judge, argued by K & B against her, and was never subjected to objection or cross-examination.

Petitioner recognizes, as the Fifth Circuit stated, that decisions regarding continuance and severance are ordinarily matters for the trial court's discretion and not to

⁶ Judge Cassibry found that the reasons for Ms. Capaci's discharge were:

1. She took an inordinate amount of time getting prescriptions filled that evening, creating customer dissatisfaction;
2. She invited a customer into the prescription department against company policy; and
3. She offered medication to a waiting customer who was not the person for whom the medication was intended. 525 F.Supp. at 349.

be disturbed in the absence of abuse; she submits, however, that the right to confront and cross-examine witnesses is a fundamental aspect of due process and a denial of such right is by its very nature an abuse of discretion. As the Court said in *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) at 90 S.Ct., p. 1021:

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. E.G., *ICC v. Louisville & N. R. Co.*, 227 U.S. 88, 93-94, 33 S.Ct. 185, 187-188, 57 L.Ed. 431 (1913); *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103-104, 83 S.Ct. 1175, 1180-1181, 10 L.Ed.2d 224 (1963). What we said in *Greene v. McElroy*, 360 U.S. 474, 496-497, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959), is particularly pertinent here:

'Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They

find expression in the Sixth Amendment ***. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases.***but also in all types of cases where administrative*** actions were under scrutiny.'

III

The district court's sole finding in petitioner's favor was that she had been harassed by the international building of her personnel file (525 F.Supp. 347) and the judge's proposed remedy by "declaring that K & B, Inc. violated the retaliation prohibition of 42 U.S.C. 2000e-3 by its building of plaintiff's personnel file. At the conclusion of this litigation and after all time for seeking further appellate review has expired, plaintiff's personnel file shall be destroyed." (Appendix, p. 88, Document C).

The Court of Appeals affirmed all aspects of the district court's adjudication of Ms. Capaci's individual claim. The court found nevertheless that the supervisors had never been encouraged to harass her.

At the very least on these findings the court should award plaintiff damages, and attorney's fees and costs. 42 U.S.C. 2000e-5(g) authorizes the court on a finding that the respondent has engaged in an unlawful employment practice charged in the complaint to render any "equitable relief as the court deems appropriate."

There is a strong public interest to encourage persons to resort to law to settle grievances and a correlative public interest to deter harassment against persons because they seek redress at law.

The relief granted by the trial judge is inadequate and unjust; Capaci's personnel file should not be simply destroyed. That which respondent built by way of prohibited retaliation should be destroyed. The letters of commendation that disappeared should be replaced. Additionally, petitioner suggests on remand that the court be instructed to hold a hearing and make an award for damages caused by respondent's wrongful retaliation and a determination of petitioner's legal fees.

This Court has noted in *Great American Federal Savings and Loan Association v. Novotny*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979), "The majority of the federal courts have held that the Act [Title VII] does not allow a court to award general or punitive damages." 99 S.Ct., at 2350. But certainly damages may be awarded as an incident of equitable relief. The language of the Act does not prohibit such an award. The circumstances of this case are such that it is an appropriate relief.

WHEREFORE, petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, and after due proceedings are had, the judgment of the district court and the United States Court of Appeals for the Fifth Circuit be reversed, and petitioner's case be remanded to the district court with appropriate instructions.

Respectfully submitted,

Carl J. Schumacher, Jr.
C. David Schumacher

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Brief this the 29 day of December, 1983 by placing it in the United States Postal Service postage prepaid to:

Mr. Daniel Lund
MONTGOMERY, BARNETT, BROWN & READ
806 First NBC Building
New Orleans, LA 70112

Mr. Lawrence L. Legarde, Jr.
6350 Vicksburg Street
New Orleans, LA 70124

Mr. James Miller and Ms. Sandra Bryan
EEOC
2401 E Street, N.W.
Washington, D.C. 20506

Mr. Jeffrey C. Bannon
Equal Employment Opportunity Commission
Office of the General Counsel
Washington, D.C. 20506

Carl J. Schumacher, Jr.

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